

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:

**The Application for Certification for the
CARLSBAD ENERGY CENTER
PROJECT**

Docket No. 07-AFC-6

**APPLICANT'S REPLY IN OPPOSITION TO THE RESPONSE OF THE CITY OF
CARLSBAD AND CARLSBAD REDEVELOPMENT AGENCY**

March 16, 2010

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I. INTRODUCTION

On March 1, 2010, the City of Carlsbad and the Carlsbad Redevelopment Agency (collectively, "City") filed a pleading captioned as Response of the City of Carlsbad and the Carlsbad Redevelopment Agency to the Motion of Carlsbad Energy Center LLC to Admit Supplemental Documents Into the Evidentiary Record ("Response"). Applicant Carlsbad Energy Center LLC ("Applicant") submits this Reply in Opposition to the Response (the "Reply"). The City does not oppose Applicant's February 18, 2010 Motion to Admit Supplemental Documents Into the Evidentiary Record ("Motion") and, accordingly, the Committee should grant Applicant's Motion for the reasons stated therein.

The City's Response, however, attempts to submit in an untimely, unsupported manner, additional testimony into the evidentiary record, without making a proper motion. The Committee should deny the City's procedurally flawed attempt to augment the evidentiary record because the additional testimony offered by the City is not subject to cross-examination and contains inadmissible hearsay.

II. BACKGROUND

On February 18, 2010, Applicant submitted the Motion requesting that the Siting Committee (“Committee”) for the Carlsbad Energy Center Project (“CECP”) admit supplemental documents into the CECP evidentiary record. These documents consist of the final Carlsbad Planning Commission and the City Council approved plans for the Poseidon desalinization project (the “Documents”). On March 1, 2010, the City filed its Response to the Motion. The City did not object to or oppose Applicant’s Motion. (*See* Response at p. 1.) Rather, the City attached the “Supplemental Testimony of James Weigand,” Fire Marshal for the City of Carlsbad (“Supplemental Testimony”). The Supplemental Testimony includes, amongst other things, a summary of an alleged conversation between Fire Marshal Weigand and Fire Chief Ed Badamo from the South District of the Middletown, Connecticut Fire Department on February 22, 2010, regarding the Kleen Energy Plant in Connecticut. (*See* Supplemental Testimony at pp. 4-5.)

III. ARGUMENT

A. The Committee Should Reject the City’s Attempted Submission of New Testimony.

Applicant properly submitted the Motion pursuant to Title 20, California Code of Regulations, section 1716.5 (“CCR § 1716.5”) requesting that the Committee admit the Documents into the evidentiary record. Applicant’s Motion included a clear explanation of both the regulations that authorize the Committee to admit the Documents into the evidentiary record and the evidentiary value of the Documents. CCR § 1716.5 provides that any party can file a response to a motion within fifteen (15) days of the filing of the motion, and, accordingly, the City timely filed its Response in which it stated its non-opposition to the Motion.

The City, however, also submitted the Supplemental Testimony without making the requisite motion to add it to the evidentiary record and without any explanation of why the

Committee should admit the Supplemental Testimony. Absent an appropriate motion and explanation of the admissibility and evidentiary value of the Supplemental Testimony, the Committee should not strain itself to admit the City's Supplemental Testimony into the evidentiary record.

B. The City's Proposed Supplemental Testimony is Inadmissible.

Assuming, *arguendo*, the City made a proper motion to admit the Supplemental Testimony, the Committee should reject the Supplemental Testimony because it is not subject to cross-examination and contains inadmissible hearsay. In its Response, the City states:

The Applicant desires to have a sketch of the Poseidon Desalination project placed into the record without giving other parties any opportunity to question their veracity of the material or rebut their conclusions. Under most circumstances, the City would object to the Applicant's motion as an attempt to circumvent the Commission's regulations regarding the admission of evidence. However, in this case, we believe it is important to view the description and also receive an explanation by the Fire Marshal now that he has had time to properly examine the documents. (Response at p. 1.)

The City's Response is misleading in several respects. First, contrary to the City's assertions, all parties have an opportunity to question the veracity of the Documents — CCR § 1716.5 specifically authorizes and invites the parties to do so. The City took advantage of CCR § 1716.5 and filed its Response to the Motion. Nonetheless, the City failed to challenge the veracity of the Documents, presumably for the simple reason that the Documents came from the City's own files.

Further, the Documents speak for themselves and do not require the City to explain them or "rebut their conclusions," to the extent the Documents make any conclusions. The City's Response, however, does not explain the Documents or rebut their conclusions. Rather, the City

submits new material in the form of the Supplemental Testimony, which contains little or no reference to the Documents and less probative value.¹

In contrast to Applicant's request to admit documentary evidence into the record, the City's Supplemental Testimony contains new testimony relating to CECP, the Poseidon project and the Kleen Energy Project – a wholly unrelated and structurally distinguishable power project located in Connecticut. It would be improper to admit the City's Supplemental Testimony to the evidentiary record because it contains entirely new testimony from a witness without subjecting that witness to cross-examination. Moreover, admitting such testimony without affording the parties an opportunity to cross-examine the witness would violate fundamental fairness and due process.

Further, the two page summary of Fire Marshal Weigand's conversation with Fire Chief Badamo contained in the City's Supplemental Testimony constitutes inadmissible hearsay because Badamo's statements are offered for their truth and were made outside of the proceedings. Fire Chief Badamo was not under oath when he made these statements, and the parties cannot cross-examine him regarding these statements. The City's Supplemental Testimony, therefore, should be excluded as inadmissible hearsay.

The Documents, on the other hand, speak for themselves, come directly from the City's files, and can be admitted to the evidentiary record without reopening it, while maintaining the fundamental fairness of the CECP proceeding.

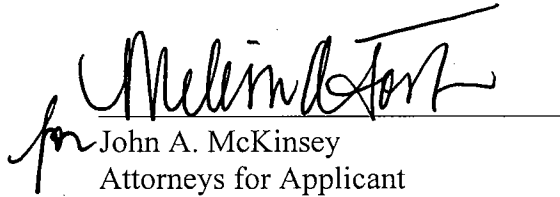
¹ The Supplemental Testimony also includes an unfounded attempt to revise the testimony Fire Marshal Weigand provided during the evidentiary hearings. The Supplemental Testimony states, "As the record shows (CECP Evidentiary Hearing Transcript February 4, 2009 Page 101), during cross-examination, I agreed that some parts of emergency access for [Poseidon] may be less than 42 feet, but that the Carlsbad Fire Department (CFD) had maintained increased access areas surrounding the hazardous portions of the desalination plant – specifically the chemical storage area located on the eastern portion of the project (defined by the x-out area on the attached site map- Attachment 1)." A review of the hearing transcript reveals that Fire Marshal Weigand did not "agree that some parts of emergency access for Poseidon may be less than 42 feet." To the extent the City desires to change Fire Marshal Weigand's testimony, the City should do so via a proper request and subject to cross-examination.

IV. CONCLUSION

The Committee should grant Applicant's Motion for the reasons originally stated in the Motion. Conversely, the Committee should reject and not admit the City's Supplemental Testimony into the evidentiary record because (1) the City has failed to make a proper motion or explain why the Supplemental Testimony should be admitted; and (2) the Supplemental Testimony contains new evidence from witnesses that are not subject to cross-examination and contains inadmissible hearsay.

Date: March 16, 2010

Stoel Rives LLP

A handwritten signature in black ink, appearing to read "John A. McKinsey", is written over a horizontal line. To the left of the signature, the word "for" is written in a cursive script.

John A. McKinsey
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APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT

Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 2/16/2010)

Carlsbad Energy Center LLC's
Applicant's Reply in Opposition to the Response of the City of Carlsbad and
Carlsbad Redevelopment Agency

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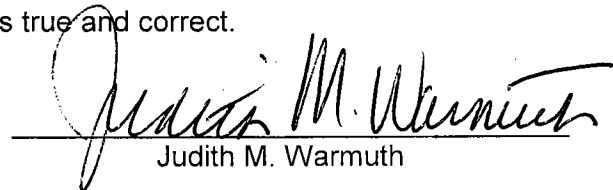
DECLARATION OF SERVICE

I, Judith M. Warmuth, declare that on March 16, 2010, I deposited copies of the aforementioned document in the United States mail at 500 Capitol Mall, Suite 1600, Sacramento, California 95814, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, Title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.


Judith M. Warmuth